RECENT CASES.

AGENCY — NONFEASANCE BY AGENT — LIABILITY TO THIRD PARTIES. — The plaintiff was injured through the negligence of the defendant, a real estate agent, in failing to keep in proper repair certain premises of which he had been given the entire control by the owner. *Held*, that the plaintiff could recover from the agent. *Lough* v. *Davis & Co.*, 70 Pac. Rep. 491 (Wash.).

The defendant could not be held by a third party, on any doctrine of agency, for mere failure to perform a duty to his principal. *Hill* v. *Caverly*, 7 N. H. 215. But an agent, like anyone else, may be liable for misfeasance, and an otherwise lawful act, if performed without taking proper precautions, may by reason of this omission become a misfeasance. *Bell* v. *Josselyn*, 3 Gray (Mass.) 309. Accordingly, if the injury to the plaintiff resulted from wrongfully letting the premises without repairing them, the defendant may have been rightfully held. But the court bases its decision upon the doctrine that anyone who is exercising entire control over property, in place of the owner, thereby incurs the common law obligations of an owner toward the public. Such a principle would be a striking development in the law of tort liability, for it is unwarranted by the authorities. *Delaney* v. *Rochereau*, 34 La. Ann. 1123. It is perhaps defensible, however, as a matter of policy, and it accords with language used in several similar cases. See *Baird* v. *Shipman*, 132 Ill. 16.

BANKRUPTCY — EFFECT OF NATIONAL ACT UPON STATE LAWS. — Proceedings in involuntary bankruptcy under a state law were begun against a mining corporation. A judgment creditor of the corporation petitioned for a writ of prohibition to prevent the state court from assuming jurisdiction, on the ground that the state law was suspended by the national act of 1898. *Held*, that the writ will not issue, since the act of 1898 does not apply to mining corporations and the state law is consequently still in force as regards them. *Herron Co.* v. *Superior Court, etc., of San Francisco*, 68 Pac. Rep. 814 (Cal.).

State laws which are properly bankruptcy acts are to be distinguished from isolated statutes not forming part of any regular system of bankruptcy, although having to some extent similar objects. See 14 HARV. L. REV. 541. The latter class of laws are not suspended by the passage of a national act. *Steelman* v. *Mattix*, 36 N. J. Law 344. The former, however, according to what seems the better view, are entirely suspended as regards cases in which proceedings might be had under the national act. *Ketcham* v. *McNamara*, 72 Conn. 709. It would seem that the same result should be reached in those cases which, like the principal case, do not fall within the scope of the national act. LOWELL, BANKR., § 9; *contra*, *Shepardson's Appeal*, 36 Conn. 23. The contrary view leaves the states such freedom to make new provisions concerning the commission of acts of bankruptcy and regarding other subjects upon which Congress has chosen to remain silent as practically to nullify the power of Congress "to establish uniform laws on the subject of bankruptcies," contemplated by the Federal Constitution. It is submitted that the principal decision is unfortunate as involving this result.

BANKRUPTCY — PROVABLE CLAIMS — FUTURE RENT. — *Held*, that adjudication in bankruptcy terminates the existing relation of landlord and tenant so that a claim for rent accruing after the adjudication will not be allowed though the tenant had executed promissory notes therefor. *In re Hays, etc., Co.*, 117 Fed. Rep. 879 (Ky., Dist. Ct.). For a discussion of the principles involved, see 14 HARV. L. REV. 457.

CARRIERS — REGULATION OF FARES BY MUNICIPALITY — TRANSFERS. — By its charter the City of Chicago was given power to regulate the charges of street railways. In pursuance of this power, §§ 1723 and 1725 of the Revised Code of the City were passed requiring street railways to issue transfers entitling passengers to ride on a connecting line of the same company without payment of an additional fare. *Held*, that this is a reasonable regulation and is valid. *Chicago Union Traction Co.* v. *City of Chicago*, 65 N. E. Rep. (Ill., Sup. Ct.) 451.

The legality of the ordinance was contested on two grounds: first, that the municipality had no authority to pass such an ordinance; and secondly, that it was an impairment of the obligation of a contract. The decision of the court on the first contention would seem to be correct. That a state may regulate the rates charged by common carriers is too well established to admit of question. *Chicago, etc., R. R. Co.* v. *Iowa*,

94 U. S. 155. This power the state may exercise through agents appointed by it. *Chicago, etc., R. R. Co.* v. *Minnesota*, 134 U. S. 418. It would seem to follow then that a municipality having, by direct authority of the state, power to set a maximum rate of fares, may set the rate for carriage over two lines operated by the same company, as well as over one. It is a mere incident to the latter power to require the issue of a transfer. Nor is this regulation so unreasonable as to warrant judicial interference. *Chicago, etc., R. R. Co.* v. *Wellman*, 143 U. S. 339. The precise point of the principal case, it seems, has not hitherto been decided. The question involved in the second contention has been fully discussed in 16 HARV. L. REV. 1.

CONSTITUTIONAL LAW — DUE PROCESS — SPECIAL ASSESSMENTS. — The Massachusetts Statutes of 1867, c. 106, provide for building sewers in the city of Worcester and the assessment of the proportionate share of the cost upon "every person owning real estate upon any street, etc., or whose real estate may be benefited thereby." *Held*, that the statute is constitutional. *Smith* v. *Worcester*, 65 N. E. Rep. 40 (Mass.).

The statute involved in the principal case might seem to fall within the class already declared unconstitutional by the Massachusetts court because by authorizing an assessment of the entire cost of a local improvement on the estates benefited, it might cause the tax on any single estate to exceed the benefits conferred. *Sorden* v. *Coffey*, 178 Mass. 489; *cf. Norwood* v *Baker*, 172 U. S. 269. But since it already had been declared a valid exercise of the taxing power, the court hesitated to reverse the earlier decision. *Butler* v. *City of Worcester*, 112 Mass. 541. The court therefore makes a distinction between statutes of "general future application" and those in which the legislature may be supposed to have acted in view of a specific scheme. In the former class of statutes, of which that in the principal case might seem to be one, the court would follow its latest decisions and declare them unconstitutional. But in the latter, within which the statute in question was considered to be, the statute will be supported provided the resulting assessment is not in substantial excess of the benefits conferred. The decision furnishes an indirect means for the Massachusetts court to follow the United States' decisions limiting *Norwood* v. *Baker*. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; see 15 HARV. L. REV. 307.

CONSTITUTIONAL LAW — NATURALIZATION — JAPANESE NOT ELIGIBLE TO CITIZENSHIP. — A statute provides that applicants for admission to the bar shall be citizens of the United States. 2 Hill's Stat. of Wash., sec. 92. An applicant produced a certificate of naturalization from a county court, which showed him to be a native and former citizen of Japan. *Held*, that a Japanese is not eligible to citizenship in the United States and that the judgment of naturalization may be collaterally attacked. *In re Takuji Yamashita*, 70 Pac. Rep. 482 (Wash.).

The power to regulate naturalization is vested exclusively in the federal government. Const. of U. S., Art. I. sec. 8; *Thurlow* v. *Massachusetts*, 5 How. (U. S. Sup. Ct.) 504, 585. The first naturalization act provided for admission to citizenship of "free white persons," only, Act of Apr. 14, 1802, but by amendment the privilege was extended to persons of African nativity and descent. Act of July 14, 1870, c. 254, § 7. The term "white" in these acts has been generally construed to include only the Caucasian race, and accordingly Chinese, Hawaiians, Burmans, and Canadian Indians have been refused naturalization. *In re Ah Yup*, 5 Saw. (U. S. Circ. Ct.) 155; *In re Kanaka Nian*, 6 Utah, 259; *In re Po*, 28 N. Y. Supp. 383; *In re Camille*, 6 Fed. Rep. 256. On the other hand, one apparently a Mexican Indian was admitted to citizenship. *In re Rodriguez*, 81 Fed. Rep. 337. But this decision, if correct, might be rested upon peculiar naturalization treaties with Mexico. See Treaty, Feb. 2d, 1848. A statute passed in 1882, U. S. Comp. St. 1901, sec. 2169, forbidding the naturalization of Chinese has been considered as merely declaratory of existing law. *In re Po*, *supra*. The conclusion in the principal case seems therefore correct. It is sustained by the only decision found upon the exact point. *In re Saito*, 62 Fed. Rep. 126. Since the naturalization record showed that upon the facts found the county court had no right to grant the certificate, a collateral attack upon this judgment void on its face was rightly allowed. *In re Hong Yen Chang*, 84 Cal. 163; *In re Gee Hoop*, 71 Fed. Rep. 274.

CONSTITUTIONAL LAW — PRESIDENT'S PARDONING POWER FOR CONTEMPT OF FEDERAL COURT. — Two county judges were committed for contempt for disobeying a writ of mandamus from a circuit court ordering them to levy a certain tax for payment of a judgment. They sought a writ of *habeas corpus*, pending a petition to the President for pardon. *Held*, that the President has no power to pardon, and therefore the writ is denied. *In re Nevitt*, 117 Fed. Rep 448 (C. C. A., Eighth Circ.). See NOTES, p. 291.

CONSTITUTIONAL LAW — SPECIAL PRIVILEGES — EXCEPTION OF LABOR UNION FROM LAW AGAINST COMBINATIONS. — A Nebraska statute, Comp. St. 1901, c. 91 a, making combinations in restraint of trade illegal, expressly excepted labor unions from its operation. *Held*, that the statute does not violate the provision of the state constitution, forbidding the grant of a special privilege or immunity. *Cleland* v. *Anderson*, 92 N. W. Rep. 306 (Neb.).

The exception from the operation of a statute of certain members of the class dealt with does not, *ipso facto*, render the statute unconstitutional. The test is whether there is a reasonable need, based upon public welfare, for a different treatment of the members excepted. *Am. Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Magoun* v. *Ill. Savings Bank*, 170 U. S. 283. The growing favor with which the law has come to regard combinations of labor, tends to show the reasonableness of the exception made by the Nebraska statute. At common law combinations of laborers to raise wages, were by early decisions held illegal along with other combinations in restraint of trade. *The King* v. *Journeymen-Taylors*, 8 Mod. 11; *People* v. *Fisher*, 14 Wend. (N. Y.) 9. But of late years this form of combination has been considered less harmful. Strikes were declared lawful in England by statute, 34 & 35 Vict. c. 32, and in this country by the courts themselves. *Commonwealth* v. *Hunt*, 4 Met. (Mass.) 111; see *Curran* v. *Galen*, 152 N. Y. 33. Moreover, the action of the legislature, as indicative of public need, should be given great weight. It would seem, therefore, an unusually strong case for the application of the rule that a statute should be held constitutional unless it is clearly bad. See COOLEY, PRIN. CONST. L. 159. It is interesting to note that this same statute was held by the Federal Circuit Court to contravene the Fourteenth Amendment. *Niagara Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816.

CONTRACTS — PAYMENT FOR LAND BY INSTALLMENTS — MEASURE OF DAMAGES. — The defendant contracted to purchase certain lots from the plaintiff and to pay for them by installments. After the last installment had fallen due the plaintiff brought an action for the full contract price but without tendering a deed of the land. *Held*, that the plaintiff could recover all except the last installment. *Gray* v. *Meek*, 64 N. E. Rep. 1020 (Ill., Sup. Ct.).

Where several installments are due under a contract they constitute ordinarily but one indivisible cause of action. *Barrett* v. *Belfy*, 47 Conn. 323; *Reformed, etc., Church* v. *Brown*, 54 Barb. (N. Y.) 191; *Jarrett* v. *Self*, 90 N. C. 478. But in the principal case the failure of the plaintiff to tender a deed of the land constituted a defense for the failure to pay the last installment which did not exist for the prior defaults. Under these circumstances the Illinois courts hold that the plaintiff may waive his right to the last installment and collect the others. *Duncan* v. *Charles*, 5 Ill. 561. But the more general and better doctrine seems to be that if the plaintiff has not a good right of action for all the installments due in point of time he has no right of action for any. *Beecher* v. *Conradt*, 3 Kernan (N. Y.) 108; *McCroskey* v. *Ladd*, 96 Cal. 455. The Illinois doctrine would seem to grant the vendor practically specific performance at law. Much the same result is reached, on the other doctrine, when the deed has been tendered. *Richards* v. *Edick*, 17 Barb. (N. Y.) 260, 264. Both results seem unfortunate. A better view would seem to be that where there has been a material breach, the vendor can sue only for such breach. Then, whether the deed has been tendered, or this is excused by the vendee's breach, the damages should be only the difference between the contract price and the market value of the land. See *Griswold* v. *Sabin*, 51 N. H. 167; *Hogan* v. *Kyle*, 7 Wash. 595.

CONTRACTS — RESCISSION — LOSS OF THE RIGHT BY NEGLIGENCE. — P signed an application for an insurance policy in the belief, induced by the fraud of the company's agent, that it called for a policy different from that for which it really called. P received the policy designated in the application and paid the first premium. Four months later, upon examining the policy for the first time, he discovered the fraud. *Held*, that because of unreasonable delay P cannot rescind the contract and the plaintiff, his assignee, cannot recover any part of the premium paid. *Bostwick* v. *Ins. Co.*, 92 N. W. Rep. 246 (Wis.).

The right to rescind because of fraud, being strictly an equitable right, is lost by acquiescence for an unreasonable length of time. *Cox* v. *Montgomery*, 36 Ill. 396; see *Norris* v. *Haggin*, 136 U. S. 386, 391; POLLOCK, CONT., 7th ed., 590–592. There can, however, be no acquiescence in the strict sense until there is knowledge of the fraud. Hence, ordinarily, mere delay without such knowledge does not preclude the right to rescind. *Pence* v. *Langdon*, 99 U. S. 578; *Lindsay, etc., Co.* v. *Hurd*, L. R. 5 P. C. 221, 241. But when in a business transaction like that of the principal case, the defrauded party has negligently failed to open his eyes to that which he should readily have discovered, sound policy would seem to require that mere ignorance of the fraud be regarded as

immaterial. See *Pence* v. *Langdon, supra*, 581. Obviously the case would not have fallen within this principle had fraud been exercised at the time of delivering the policy so as to throw the insured off his guard. This was so held in a recent case before the same court. *Bostwick* v. *Ins. Co.*, 92 N. W. Rep. 246. In short, it is a question of fact whether under all the circumstances the defrauded party was inexcusably negligent. Thus the principal case appears sound on principle; and such authorities as have been found are in accord. *Nat. Bank* v. *Taylor*, 5 S. Dak. 99, 111; see *McMaster* v. *Ins. Co.*, 87 Fed. Rep. 63.

CORPORATIONS — RIGHT OF DIRECTORS TO PREFER THEMSELVES AS CREDITORS. — The directors of a corporation were sureties on corporate debts. With the knowledge that the corporation was insolvent they transferred the entire corporate property to a trustee for payment of said debts. *Held*, that the conveyance will not be set aside as in fraud of creditors in a suit by one of them. *Nappannee Canning Co.* v. *Reid Murdock & Co.*, 64 N. E. Rep. 870, dissenting opinion 1115 (Ind., Sup. Ct.). For a discussion of the contrary decision of this case in the lower court, see 15 HARV. L. REV. 409.

CRIMINAL LAW — NEGLIGENT MANSLAUGHTER — FAILURE TO GUARD RAILROAD CROSSING. — Through the negligence of the defendant, a gate-keeper at a railroad crossing, in failing to close the gates a pedestrian was killed by a passing train. *Held*, that the defendant is guilty of manslaughter. *Rex* v. *Pitwood*, 19 T. L. R. 37 (Eng.). See NOTES, p. 297.

DAMAGES — CONTRACT FOR THE SALE OF REALTY — WILFUL DEFAULT BY VENDOR. — The vendor in a contract for the sale of realty refused to perform on the ground that she had made a poor bargain. *Held*, that the vendee, in an action for the breach, can recover only the purchase money actually paid, with interest. *Stuart* v. *Pennis*, 42 S. E. Rep. 667 (Va.).

Damages for the breach of a contract for the sale of realty, when this is due to the owner's non-culpable inability to convey clear title, are limited to the purchase money paid, with interest. *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Baldwin* v. *Munn*, 2 Wend. (N. Y.) 399. The rule, however, is restricted to cases of failure of title, where this limitation of damages may be sustained by reasons analogous to those for the defense of impossibility in an ordinary action on the contract. See SEDG. DAM., 8th ed., § 1006. But where the breach is wilful, there is no reason for reducing the damages, and full compensation is allowed. *Western R. R.* v. *Babcock*, 6 Met. (Mass.) 346; *Barbour* v. *Nichols*, 3 R. I. 187; *Allen* v. *Atkinson*, 21 Mich. 351. Nor is the principal case supported by the decisions of its own jurisdiction, for the authority cited as extending the rule in Virginia is, in so far as it is in point, confined to cases of failure of title, and two decisions tend to establish the proper rule of damages. *Wilson* v. *Spencer*, 11 Leigh (Va.) 261; *Newbrough* v. *Walker*, 8 Gratt. (Va.) 16.

DAMAGES — STIPULATED DAMAGES — WHEN ENFORCED. — The defendant contracted with the plaintiff to allow him the exclusive right of selling its pianos in St Louis, and to pay him one hundred dollars for each and every breach of such agreement. *Held*, that, since the stipulated damages are not excessive and the actual damage cannot be measured with approximate certainty, the stipulated damages will be enforced. *Menges* v. *Milton Piano Co*, 70 S. W. Rep. 250 (Mo. App.).

The expressed intention of the parties will in general govern in determining whether the stipulated sum is to be construed as a penalty, when it is unenforceable, or as liquidated damages. *Monmouth Park Assn.* v. *Wallis Iron Works*, 55 N. J. Law 132, 140. The fact that the actual damage is incapable of approximate measurement has been a factor in determining the courts to give effect to the stipulated damages. *Streeper* v. *Williams*, 48 Pa. St. 450; *Wooster* v. *Kisch*, 26 Hun (N. Y.) 61. But in no case will the fundamental principle that what is sought is compensation only be violated. *Myer* v. *Hart*, 40 Mich. 517, 523; *Frank* v. *Block*, 9 N. Y. St. 101. The decision of the principal case therefore seems to be sound on principle and in accord with the authorities. *Streeper* v. *Williams, supra*; *Jones* v. *Binford*, 74 Me. 439. A similar but distinct class of cases is found where a party contracts in the alternative to do a certain act or to pay a certain sum at his option. In these cases a failure to do the act is construed as an election to pay the sum stipulated, and payment will be enforced. *Pearson* v. *Williams' Admrs.*, 24 Wend. (N. Y.) 244, affirmed 26 Wend. (N. Y.) 630; see *Penn. R. R. Co.* v. *Reichert*, 58 Md. 261.

DAMAGES — TRANSPORTATION BY SEA — MEASURE OF DAMAGES FOR DELAY. — Goods were shipped by steam vessel from New York to South Africa. Through the negligence of the shipowner the vessel was seized and detained. When finally re-

leased there was no market for the goods. *Held*, that the measure of damages to which the owner of the goods was entitled was the difference between the market value of the goods at the time when they ought to have been delivered and the market value at the time they were in fact delivered. *Dunn* v. *Bucknall Brothers*, 51 W. R. 102 (Eng., C. A.).

It is generally law that in a suit against a carrier for delay in delivery of freight anticipated profits cannot be recovered. *Hadley* v. *Baxendale*, 9 Ex. 341. It has, however, been held, both in England and in the United States, that damages for loss in market value through delay may be obtained from a carrier by land. *Collard* v. *S. E. R. R. Co.*, 7 H. & N. 79; *Cutting* v. *Grand Trunk R. R. Co.*, 13 Allen (Mass.) 381. The reason for allowing such damages is that the market value of the goods at the time when they should have been delivered is the value of which the consignee is deprived by the breach of contract. See SEDG. DAM., 8th ed., § 753. On the ground that the precise time of arrival of goods shipped by sea cannot be ascertained, the only two cases precisely in point that have been found, hold that damages for loss of market value cannot be obtained from a carrier by sea. *The Parana*, 2 P. D. 118; *The Notting Hill*, 9 P. D. 105. These cases have been cited as law. See CARVER, CARRIAGE BY SEA, 3rd ed., § 726. They have, however, been adversely criticised. See SEDGWICK, *supra*, § 855. Since at the present time sea carriage can be accomplished with as great a degree of certainty as land carriage, there would seem to be no reason why the same rule of damages should not be applied The principal case is therefore to be commended for bringing about this desirable uniformity.

EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO BUILD AND MAINTAIN RAILROAD STATION. — The plaintiff conveyed land to the defendant in consideration of the latter's agreement to build and maintain a railroad station thereon. *Held*, that the court will give specific performance of the contract, although it is a contract to build, and involves the performance of continuous acts. *Murray* v. *Northwestern R. R. Co.*, 42 S. E. Rep. 617 (S. C.). See NOTES, p. 293.

EVIDENCE — ADMISSIONS — STATEMENT BY CO-DEVISEE. — Several devisees under the same will offered it for probate. To prove the incompetency of the testator an admission by one of the co-devisees was offered. *Held*, that this evidence is admissible. *Gibson* v. *Sutton*, 70 S. W. Rep. 188 (Ky.).

An admission of the testator's incapacity by a sole devisee or legatee is unquestionably admissible. See *In re Baird*, 47 Hun (N. Y.) 77, 78; *McMillan* v. *McDill*, 110 Ill. 47, 50. Where, as in the principal case, other devisees are parties to the record such evidence would have almost as great, if not equal, probative force. But according to the great weight of authority, it is excluded. *In re Baird*, *supra*; *Hauberger* v. *Root*, 6 W. & S. (Pa.) 431. These cases apply the general principle that mere community of interest is insufficient to render the admission of one party competent as evidence against another, even though a party to the same record. See *In re Baird*, *supra*; 1 GREENL. EV., 16th ed., § 176. Where, on the other hand, there is an identity of interest between the parties such as that of partnership, such evidence is clearly admissible. *Cady* v. *Shepherd*, 11 Pick. (Mass) 400, 407. The few authorities supporting the principal case are comparatively early cases. *Brown* v. *Moore*, 6 Serg (Tenn.) 272; *Beall* v. *Cunningham*, 1 B. Mon. (Ky.) 399. The Kentucky decision just cited went partly on the ground that at that time no party to the record could be called as a witness. This rule no longer prevails. See *Milton* v. *Hunter*, 13 Bush (Ky.) 163, 168. Since, therefore, the co-devisee may now be called upon to testify directly, the court would, it seems, have been justified in departing from a rule which, as they apparently recognized, is opposed to both principle and authority.

EVIDENCE — AFFIDAVIT OF JURORS AS TO PROCEEDINGS IN THE JURY ROOM — ATTACK ON VERDICT. — On an appeal, the plaintiff in error offered in evidence affidavits of a juror, that the foreman had made, in the jury room, from his own knowledge, statements not given before the court, and bearing on a material issue. *Held*, that the affidavits are not admissible. *St. Louis, etc, Ry. Co.* v. *Ricketts*, 70 S. W. Rep. 315 (Tex., Civ. App.).

It is a well recognized doctrine, that, in order to insure perfect freedom of discussion, testimony in regard to proceedings in the jury room should generally be excluded. *Woodward* v. *Leavitt*, 107 Mass. 453. But to exclude evidence of improper conduct such as in the principal case seems to go beyond the reason of the rule, though one case exactly in accord has been found. *Price* v. *Warren*, 1 Hen. & M. (Va.) 385; *contra*, *State* v. *Burton*, 70 Pac. Rep. 640 (Kan.). Many courts have protected even greater improprieties. See *Clum* v. *Smith*, 5 Hill (N. Y.) 560; *Boetge* v. *Landa*, 22 Tex. 105.

Such extensions, however, seem opposed to principles of justice, which would demand rather that the rule be closely restricted. There is another rule excluding evidence of the mental state of a juror, such as misunderstanding of instructions, improper motives, etc., as too difficult to disprove. *Mattox* v. *United States*, 146 U. S. 140. Some cases seem to treat this as the only rule of exclusion, and so confusion is caused, but they plainly do not involve the question in the principal case.

EVIDENCE — SELF-INCRIMINATION — EXAMINATION BY ORDER OF COURT. — A prisoner charged with rape was examined by physicians against his consent. *Held*, that the testimony of the physicians who made the examination was wrongfully admitted by the trial court. *State* v. *Height*, 91 N. W. Rep. 935 (Ia.). See NOTES, p. 300.

FRAUDULENT CONVEYANCES — CONSIDERATION — DISCONTINUANCE OF DIVORCE PROCEEDINGS. — A husband, while insolvent, conveyed property to his wife, in consideration of her discontinuing divorce proceedings then pending. *Held*, that the conveyance could be set aside by creditors of the husband, for want of sufficient consideration. *Oppenheimer* v. *Collins*, 91 N. W. Rep. 690 (Wis.).

A discontinuance of divorce proceedings is good consideration for a contract. *Phillips* v. *Meyers*, 82 Ill. 67. Inadequacy of consideration is immaterial, even where third parties are interested, except as evidence of fraud. *Bayspoole* v. *Collins*, L. R. 6 Ch. 228. Whether such a conveyance as that in the principal case should be set aside, without requiring further proof of fraud, must therefore be a question of policy alone. The point seems to be new. The court argues, that transactions of this sort if sustained would offer too great an opportunity for defrauding creditors, by the institution and discontinuance of collusive divorce proceedings. On the other hand, the rule of the court would often impose an unjust hardship upon the wife, and moreover the law favors agreements for a continuance of the marital relation. See *Adams* v. *Adams*, 91 N. Y. 381. The difficulty suggested by the court might be met perhaps with more justice to all concerned, if the circumstances were regarded as merely raising a presumption of fraud, requiring evidence of good faith from the wife.

JUDGMENTS — MERGER BY SECOND JUDGMENT — LOSS OF PRIORITIES. — X obtained a judgment constituting a lien on the judgment debtor's property; Z shortly thereafter also recovered judgment. Seven years later X brought an action on his judgment, and obtained a new judgment. *Held*, that the first judgment obtained by X is not merged in the second so as to destroy the priority of the first. *Springs* v. *Pharr*, 42 S. E. Rep. 590 (N. C.).

The decision in the principal case is in accord with previous North Carolina decisions. *Carter* v. *Coleman*, 34 N. C. 274; *McLean* v. *McLean*, 90 N. C. 530. It is rested on the old theory of merger by judgment, that a security of a higher nature extinguishes inferior securities, but not securities of equal degree. *Cf. Andrews* v. *Smith*, 9 Wend. 53. That theory explains the rule that a judgment obtained in a court of a foreign nation is not a merger of the original cause of action in the home forum; but it does not explain the rule that a judgment recovered in one of the United States merges the original cause of action in all the others. *Cf. Bank of Australasia* v. *Nias*, 16 Q. B. 717; *New York, etc., R. R. Co.* v. *McHenry*, 107 Fed. Rep. 414; *Harrington* v. *Harrington*, 154 Mass. 517. The true theory is that it is a policy of law to discourage superfluous and vexatious suits by causing a prior judgment to be merged in a second and rights under the former lost. See FREEMAN, JUDGM., 4th ed., § 215. Thus a foreign judgment is not merged, because the suit is not vexatious but for additional relief; but a judgment in one of the United States is merged in a judgment in another, because the second is vexatious and superfluous owing to Art. IV. sec. 1. of the Constitution. On the theory submitted the decision in the principal case is objectionable, unless the suit was a formal one to revive or renew the old judgment, in which case it ought to have been commenced by a *scire facias*. See BLACK, JUDGM., § 482 a.

MUNICIPAL CORPORATIONS — RIGHT TO EXCLUSIVE USE OF NAME. — A railroad company established a new station, giving it the name already borne by a town situated near by upon the same railroad. The resulting confusion caused inconvenience to passengers and to shippers. The town filed a bill to restrain the railroad company from applying this name to the new station. *Held*, that the bill is not maintainable. *Gulf & Ship Island R. R. Co.* v. *Town of Seminary*, 32 So. Rep. 953 (Miss.).

The law does not, as a general principle, recognize exclusive rights in a name, except in cases of trademark. See *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430; *New York, etc., Co.* v. *Coplay Cement Co.*, 45 Fed. Rep. 212. Equity will, however, restrain the use of another's name in business competition in such a way as to mislead the public. *Croft* v. *Day*, 7 Beav. 84; *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893. Such

injunctions involve recognition of an equitable right to carry on business unhindered by unfair competition, and seem to be merely an exercise of the broad discretionary power of equity to protect substantial interests from damage caused by sharp practice. *Cf. Kempson* v. *Kempson*, 58 N. J. Eq. 94. This doctrine obviously fails to cover the principal case, since there the injunction is not sought to protect any substantial interest of the municipal corporation as such. Nor can the corporation constitute itself guardian of the general business interests of the inhabitants. See *Dover* v. *Portsmouth Bridge*, 17 N. H. 200, 215. While, therefore, the result of the principal case may be regretted, it seems impossible to dispute the correctness of the decision. If any remedy exists, it would seem to be mandamus against the railroad company or possibly injunction at the suit of an individual who is sustaining inconvenience.

PERSONS — MORTGAGE BY INFANT — AVOIDANCE. — The plaintiff, while an infant, obtained advances from a building society, to purchase a piece of land and to erect houses thereon. The land was conveyed to the infant by the vendor and the next day mortgaged to the society to secure the advances. On learning of the plaintiff's infancy the society took possession of the property. When the plaintiff attained her majority, she repudiated the contract and mortgage, and brought action for possession. *Held*, that the mortgage is void; yet, since but for the advance of the purchase money the vendor would have had a vendor's lien, the society can to the extent of the purchase money stand in the vendor's shoes. *Nottingham, etc., Society* v. *Thurstan*, 19 T. L R. 54 (H. of L., Eng.).

This decision is a direct affirmance of the decision of the Court of Appeal in the same case which had reversed the decision of the Chancery Division. For a discussion of the principles involved in those decisions, see 14 HARV. L. REV. 388; 15 HARV. L. REV. 494. To those discussions should be added *Ready* v. *Pinkham*, 63 N. E. Rep. 887. In that case the Supreme Judicial Court of Massachusetts without reference to the English decisions reached, on similar facts, an opinion in accord with that of the Chancery Division in *Thurstan* v. *Nottingham, etc., Society*, [1901] 1 Ch. 88.

PROPERTY — CONTINGENT OR VESTED REMAINDER. — The testator devises land to A for life, remainder to any child or children surviving him, but if A dies leaving no child surviving him, then to his brothers and sisters. *Held*, that the brother has a vested remainder subject to be divested by the birth of a child. *Boatman* v. *Boatman*, 65 N. E. Rep. 81 (Ill., Sup. Ct.).

A remainder is usually considered vested if it is subject to no condition precedent save the termination of the preceding estate. Vested estates are favored by the law, and conditions are construed as subsequent if possible. This policy seems to have led to the above decision. But in the principal case the contingency must obviously happen, if at all, before the estates in remainder come into possession and therefore is precedent in fact. The law, however, looks less to the operation of the condition than to the language employed in the gift. See GRAY, PERP., § 108. Thus, if after an absolute estate is given, a divesting clause is added, the estate is considered vested. *Andrew* v. *Andrew*, 1 Ch. D. 410. But if the condition is incorporated into the description of the estate in remainder, it is regarded as contingent. *Price* v. *Hall*, L. R. 5 Eq. 399. The question is largely one of construction, but it would seem that the remainder in the principal case should, under these rules, be regarded as contingent. *Doe d. Planner* v. *Scudamore*, 2 B. & P. 289. See GRAY, PERP., §§ 101–108.

PROPERTY — DEEDS — DELIVERY IN ESCROW TO THE GRANTEE. — The plaintiff executed a deed of land to her husband and placed it in his possession with the understanding that it was to be recorded only in case he survived her. The husband died in the plaintiff's lifetime, having previously recorded the deed. An action to quiet title was brought. *Held*, that the deed was never delivered so as to pass title to the husband. *Kenney v. Parks*, 70 Pac. Rep. (Cal.) 556.

A deed may be delivered in escrow to a third party. *Raymond* v. *Smith*, 5 Conn. 555. But if the delivery is to the grantee, it has long been the rule that an escrow cannot be created and that the deed becomes operative at once. SHEPPARD'S TOUCH. 59; *Darling* v. *Butler*, 45 Fed. Rep. 332. The origin of this distinction appears to have been the importance attached to sealed instruments, lawfully in the possession of a grantee or obligee. COKE'S LIT., 36 a. Although a seal is no longer so important, the objection remains to controverting the natural inference from the grantee's rightful possession of an instrument of title. The decision, however, is supported by the analogy of the rule permitting conditional delivery to the grantee if not strictly in escrow. *Brackett* v. *Barney*, 28 N. Y. 333. Also simple contracts though not bonds, may be delivered in escrow to the obligee. *Pym* v. *Campbell*, 6 E. & B. 370; *Moss* v. *Riddle*, 5 Cranch (U. S. Sup.

Ct) 351. But the prevailing view, by restricting the grantor to equitable relief, protects an innocent third party dealing with the grantee, and hence would seem preferable to the rule of the principal case which extends the dangerous doctrine of escrow, so harsh to third parties. See *Smith* v. *South Royalton Bank*, 32 Vt. 341.

PROPERTY — GIFT CAUSA MORTIS — PAROL CHOSE IN ACTION. — A creditor, seriously ill and in expectation of death, orally directed the defendant, his debtor, to pay the plaintiff's deceased the debt, which was not evidenced by note or other writing. The debtor assented, and, shortly after, the original creditor died. *Held*, that the plaintiff is entitled to recover the amount of the debt. *Castle* v. *Persons*, 117 Fed. Rep. 835 (C. C. A., Eighth Circ.).

The court differed here both as to result and reasoning. Of the majority, one judge thought there was a valid gift *causa mortis;* the other, a good novation. The first ground seems erroneous. Where a chose in action is not in the form of a specialty, a gift of it seems never to have been held to operate as more than a revocable power of attorney. If so, it should be revoked by the death of the donor. *Sewell* v. *Moxy*, 2 Sim. N. S. 189; *contra*, *Airey* v. *Hall*, 3 Sm. & G. 315. The decision must be supported, then, if at all, on the second ground. It must appear that the plaintiff sued as sole beneficiary on a new contract between the debtor and original creditor, which would amount to a substitution of creditors, a sort of novation resulting from the sole beneficiary doctrine. Whether these were the facts may well be doubted. Courts have reached a like result on the erroneous reasoning that the debtor became a trustee for the intended beneficiary. *McFadden* v. *Jenkins*, 1 Ph. 153; *Eaton* v. *Cook*, 25 N. J. Eq. 55.

PROPERTY — LEGACIES — SET-OFF OF DEBT BARRED BY STATUTE OF LIMITATIONS. — In a hearing in the Probate Court on the distribution of an estate it appeared that a legatee owed the testator a debt barred by the Statute of Limitations. *Held*, that the amount of the debt should be deducted from the bequest made to the legatee. *Holden* v. *Spier*, 70 Pac. Rep. 348 (Kan.). A contrary decision on similar facts is reported in *Wilson* v. *Smith*, 117 Fed. Rep. 707 (Circ. Ct. E. D. Pa.). For a discussion of the principles involved, see 14 HARV. L. REV. 73.

PROPERTY — PERCOLATING WATERS — LIMITATIONS UPON RIGHT TO APPROPRIATE. — The defendant dug artesian wells on his land and piped percolating water off to sell for irrigation purposes, to the damage of adjoining landowners. *Held*, that a landowner must be limited to the reasonable use of such water in connection with the use of his own land. *Katz* v. *Walkinshaw*, 70 Pac. Rep. 663 (Cal.). See NOTES, p. 295.

PROPERTY — PERPETUITIES — RULE AGAINST A POSSIBILITY ON A POSSIBILITY. — By a marriage settlement, and by an appointment under it, a gift of personalty was made to unborn children for life, with limitations over to their unborn children. Suit was brought to determine whether the limitations over were bad for remoteness. *Held*, that they are valid, since the old rule against a possibility on a possibility has no application to personal estate. *In re Bowles*, [1902] 2 Ch. 650. See NOTES, p. 294.

PROPERTY — RIGHT OF GENERAL PECUNIARY LEGATEE TO MARSHAL AS AGAINST SPECIFIC DEVISEE. — A testator first directed that all his debts be paid, and then left two pecuniary legacies to A and B, and his farm to X. The general personal estate was insufficient to pay the debts and legacies. *Held*, that A and B may marshal the assets so as to stand in the place of the creditors against the realty, so far as the debts were paid out of the personalty. *In re Roberts*, [1902] 2 Ch. 834.

The case is in line with the general trend of English decisions. *In re Stokes*, 67 L. T N. S. 223. See *contra*, *In re Bate*, L. R. 43 Ch. D. 600. The equitable doctrine of marshaling can be applied in favor of the legatees only on the assumption that the creditors have two funds which they can indifferently subject to their claims. It is true that they have. *Quarles* v. *Capell*, 2 Dyer 204 b. But it is equally true that an executor in settling debts must exhaust the personalty before applying the realty charged with their payment. *Samwell* v. *Wake*, 1 Bro. C. C. 132. It seems, therefore, at least an anomalous application of the doctrine of marshaling to prefer the general legatee at the expense of the specific devisee, whom it is ordinarily presumed to be the intention of the testator to favor. The decision, then, might better have been put on the ground that the general direction to pay debts is sufficient to express the testator's intention to charge the legacies on the realty. See *Aldrich* v. *Cooper*, 8 Ves. 381, 396. This seems to be assumed in England. But in America a much stronger expression of intention is required. See WOERNER, AM. ADM., 2nd ed., * 1095, and cases cited.

SALES — BILLS OF LADING — LIABILITY OF ASSIGNEE FOR VENDOR'S BREACH OF CONTRACT. — The defendant purchased from the vendors of corn a draft drawn on the plaintiff, the vendee. A bill of lading of the corn was attached to the draft. The vendee paid the draft and later sued the defendant for a breach of warranty on the contract of sale. *Held*, that the defendant is liable. *Russel* v. *Smith Grain Co.*, 32 So. Rep. 287 (Miss.). See NOTES, p. 292.

TORTS — EXTRA-HAZARDOUS EMPLOYMENT — LIABILITY FOR INJURIES BY CONCUSSION FROM BLASTING IN CITY STREETS. — The defendant was a contractor excavating in the streets of the city of Chicago under contract with the city. The plaintiff's building was materially damaged by the concussions from the blasts. *Held*, that the defendant is liable regardless of negligence. *Fitzsimons & Connell Co.* v. *Braun*, 65 N. E. Rep. 249 (Ill., Sup. Ct.).

In certain classes of cases the law imposes liability independent of negligence because of the extra-hazardous nature of the defendant's occupation. *Bradford Glycerine Co.* v. *St. Mary's Woolen Mfg. Co.*, 60 Ohio, 560. The principal case, however, it is submitted, should not be included within this category. The doctrine of *Fletcher* v. *Rylands* does not apply here since the defendant was acting neither solely for his own benefit nor upon his own land. Nor have others been held absolutely liable for the injuries caused by similarly dangerous agencies properly brought into city streets. *Strawbridge* v. *City of Philadelphia*, 13 Phila. (Pa.) 173; see *Denver Electric Co.* v. *Simpson*, 21 Col. 371, 372. There seems to be no reason on principle or grounds of public policy for making an exception in the case of necessary blasting under these conditions. Moreover in this case there was no technical trespass. *Cf. Hay* v. *Cohoes Co.*, 2 N. Y. 159; *French* v. *Vix* 2 N. Y. Misc. 312; *Booth* v. *Rome, etc., R. R. Co.*, 140 N. Y. 267. Yet there is authority in accord with the principal case. *Colton* v. *Onderdonk*, 69 Cal. 155. The result seems unfortunate, for it tends to impose an absolute liability where at most the injury should be only *prima facie* evidence of negligence. *Ulrich* v. *McCabe*, 1 Hilt. (N. Y.) 251. Of course the degree of care required will be commensurate with the risk involved. See *Larson* v. *Central Ry. Co.*, 56 Ill. App. 263.

TORTS — LIABILITY FOR SPREADING OF FIRE. — The defendant set fire to brush in order to clear his land. It spread to land of the plaintiff. *Held*, that the defendant maintained the fire at his own risk, and, on the principle of *Fletcher* v. *Rylands*, is absolutely responsible for damage caused by it. *Crewe* v. *Mottershawe*, 38 Can. L. J. 736 (Sup. Ct., British Columbia).

By ancient English law a defendant was liable, irrespective of negligence, for damage done by fire spreading from his property; see ROLLE, ABR. Action sur Case, B. 1; *Tubervil* v. *Stamp*, 1 Salk. 13. This was changed by a line of statutes beginning with 6 Anne, c. 31, and to-day the common law generally allows no recovery unless negligence is shown; *Vaughan* v. *Taff Vale R. R. Co.*, 5 H. & N. 679; *Dean* v. *McCarty*, 2 U. C. Q. B. 448; *Stuart* v. *Hawley*, 22 Barb. (N. Y.) 619; *contra*, *Fordyce* v. *Kearns*, 2 R. L 623 (Quebec). Whenever economic necessity has demanded it, the rule of *Fletcher* v. *Rylands* has yielded. *Madras, etc., Co* v. *Zemindar, etc*, L. R. 1 Ind. App. 364. So, too, in the "steam-boiler cases." *Marshall* v. *Welwood*, 38 N. J. Law 339. In a new country fire is a natural and often necessary means for clearing land. It may be argued that negligence would be hard to prove and its effects in such cases peculiarly disastrous. This might justify placing the burden of disproving it on the defendant, but not making him absolutely liable. So the decision in the principal case seems unsound on both authority and principle.

TORTS — NON-NEGLIGENT MISTAKE AS A DEFENSE. — The defendant, a police officer, shot and killed the plaintiff's husband, in the reasonable belief that he had committed a felony, after using all other available means to arrest him. He had in fact committed no felony. *Held*, that in an action to recover for his death the non-negligent mistake of the defendant is no defense. *Petrie* v. *Cartwright*, 70 S. W. Rep. 297 (Ky.).

This decision raises the large question of recovery against a non-culpable defendant; see 15 HARV. L. REV. 335. Recovery in tort is based generally on culpability, but there is a large class of exceptions, *e. g.*, trespass to land. As regards trespass to the person, the law seems unsettled. Where an officer arrests a person erroneously named in the process, his mistake does not excuse him. *Griswold* v. *Sedgwick*, 1 Wend. (N. Y.) 126. But where he supposes one to be subject to arrest who has a privilege, he is excused. *Tarlton* v. *Fisher*, 2 Doug. 671. The cases are difficult to distinguish. The true rule would seem to be one of policy. When the defendant's acts are of a sort not to be encouraged, his mistake should not excuse him. The act in the principal case is of this nature, so that the decision seems sound.

TORTS — PROCURING BREACH OF CONTRACT — JUSTIFICATION. — A labor union by threatening a strike forced a business firm to break its contract with an apprentice, and when sued by the latter justified its action on the ground of its prior contract with the firm forbidding such employment. *Held*, that the prior contract does not constitute justification. *Read* v. *Friendly Society, etc.*, 19 T. L. R. 20 (Eng., C. A.). See NOTES, p. 299.

TORTS — SEDUCTION — RECOVERY BY MOTHER AFTER DEATH OF FATHER. — A daughter was seduced and rendered pregnant during her father's lifetime. The father died two months before her confinement and her mother instituted the action. *Held*, that the mother may not recover, because the daughter was not her servant at the time of seduction. *Hamilton* v. *Long*, 36 Irish L. T. R. 189. See NOTES, p. 298.

WILLS — BEQUEST PROCURED BY MISREPRESENTATION OF PERSON OTHER THAN THE LEGATEE. — The testator's son had communicated to his father that he was married to one L. with whom the testator never was acquainted. In fact, L. was the son's mistress. Thereafter the testator bequeathed certain property to his son's wife, L. *Held*, that the legacy does not fail. *Anderson* v. *Berkley*, [1902] 1 Ch. 936.

In accord with previous English authority, the court found that the son's mistress was the person designated by the testator. But on the point that an innocent legatee, personally unknown to the testator, should not be deprived of her bequest because of misrepresentations to the testator by another, this seems to be the first decision. Where the beneficiary was personally known to the testator, the legacy was allowed, on the ground that it may have been given owing partly to personal affection rather than to the misrepresentation. *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319. This reason however fails in the principal case. Moreover, a gift *inter vivos* under these circumstances has been declared voidable. *Harris* v. *Delamar*, 3 Ired. Eq. (N. C.) 219. Fraud of the legatee will avoid the bequest. *Kennell* v. *Abbott*, 4 Ves. 802. Likewise undue influence by anyone. *In re Cahill*, 74 Cal. 52. These analogous cases leave the decision in the principal case open to question. A reason for the decision is that an innocent legatee is otherwise deprived of the testator's bounty. But the bequest in the principal case may well be considered as the probable and contemplated result of the deception. *Cf. Melenish* v. *Milton*, 3 Ch. D. 27, 34–35. Further, although the testator cannot control the alternative distribution of his property, this should have no greater influence than in cases of lapsed and void bequests and legacies.

BOOKS AND PERIODICALS.

CONSTITUTIONALITY OF SHIP SUBSIDIES AND SUGAR BOUNTIES. — The power of Congress to grant bounties to ship owners or sugar manufacturers is denied by a recent writer in the Columbia Law Review. *Ship Subsidies and Sugar Bounty Statutes: Their Constitutionality*, by Herman Foster Robinson, 2 Colum. L. Rev. 525 (Dec., 1902). The author argues that the power to appropriate money raised by taxation is only co-extensive with the power to tax. He maintains that Congress can tax only for a public purpose, and that payments for bounties are not for a public purpose. If bounty acts are unconstitutional, he believes that payments made under them could be recovered, and that Congress would have no power to reimburse those who might be damaged by relying upon them.

It is a part of the definition of a tax that it shall be for a public purpose. Accordingly, levies authorized by state legislatures for private purposes have always been held void. *Curtis's Admr.* v. *Whipple*, 24 Wis. 350. Further, state acts authorizing public bond issues in aid of private enterprises are held unconstitutional on the ground that the power to contract is limited by the power to tax. *Loan Assn.* v. *Topeka*, 20 Wall. (U. S. Sup. Ct.) 655 Appropriation of money in the treasury for private purposes by a state would be equally unconstitutional, since the money has been raised by taxation and must be replaced by the same means. If a state legislature, which has all legislative power not forbidden to it by the state constitution, is thus restricted as to the objects of its appropriations, it follows that Congress, which has only the more